In the

Supreme Court of the United States

October Term, 1972

No. [redacted]

MARK ALLEN, ET AL., *Petitioners*,

v.

MILLICENT F. BROWN, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States:

Petitioners respectfully pray a reversal of so much of the ruling of the United States Court of Appeals for the Fourth Circuit as affirms that portion of the opinion of the United States District Court for the Eastern District of South Carolina, which holds that this Court's decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), forecloses all federal courts as a matter of law from considering any evidence of ethnic differences in the natural learning patterns of white and negro children.

Opinions Below

The opinion of the District Court is reported *sub nom. Millicent F. Brown, et al., v. School District No. 20, Charleston, South Carolina, et al., and Mark Allen, et al.*, at 226 F. Supp. 819 (App. p. 1), the portion complained of on this petition appearing at the end of page 825 and the head of page 826 (App. pp. 12-13).

The opinion of the Court of Appeals affirming the District Court is reported at 328 F. 2d 618 (App. p. 20).

The order of the Court of Appeals denying petitioners' application for rehearing (App. p. 22) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was dated and entered January 27, 1964.

The order of the Court of Appeals denying petitioners' petition for rehearing was dated and entered March 13, 1964.

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code (28 U.S.C. §1254).

Question Presented

Is a State forbidden by the Equal Protection clause from reasonably classifying its children in schools on the basis of their educational aptitudes because the difference in aptitude is also a racial characteristic?

Statute Involved

Constitution of the United States, Amendment XIV:

> "Section 1 . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This is an action praying the desegregation of the schools of Charleston, South Carolina, and the substitution of a "unitary non-racial system" in its place. Respondents were plaintiffs below and represent all negro students in such schools. Petitioners were intervenors in the trial court and represent all white students in such schools. Petitioners, as intervenors, pleaded that the members of the two groups represented by petitioners and by respondents so differed in various phases of educability that unless separate curricula adapted to their different aptitudes and learning patterns were used, both would suffer educationally and psychologically.

The trial court reserved its ruling on respondents' objections and allowed petitioners to introduce into evidence professional studies and the testimony of scientists in the fields of biology, anthropology, sociology and psychology on these issues. Respondents did not contradict the evidence or question the qualifications of the witnesses. For the purposes of this application, therefore, respondents concede the truth of the following evidence.

It was shown that over the past fifty years more than a hundred varied tests, measured against national norms, have been made of large groups of negro and white school children in all parts of the United States and in other countries; that a number of these studies used ethnically diverse subjects who had been matched for intelligence, for economic condition and for cultural background; that

the results of all such tests without exception showed one or more of the following characteristic educability differences to exist between the two groups—and to the same extent whether matched or unmatched:

> First, the two groups differ sharply in the type of subject and type of teaching to which they respond most readily. The widest differences occur in mathematical abstraction and reading comprehension, while the smallest differences occur in subjects more largely based on memorization.
>
> Second, the natural growth rates of learning ability differ by one year for every four, such that while the average difference is about half a year on entering first grade, it increases to three and a half years by the twelfth grade, and the change is independent of the nature of the school or the child's background.
>
> Third, as a result there is an increasing difference between the two groups in average mental age (currently defined as mental maturity or psychometric intelligence and measured by a figure known as I.Q.) which in mature individuals in school approximates twenty I.Q. points.

It was further shown that the separate schools of Charleston had over the years become adapted to the differing teaching pace and subject requirements of the children of both races, that ten to twenty times as high a percentage of negro graduates of such separate high schools qualified at the minimal levels of the College Entrance Examination Boards tests as did the corresponding graduates from mixed schools in the North, that on comparison with the same group such Southern graduates received higher college marks and had greater educational motivation in interracial colleges, and that negro children taught in sepa-

rate schools had greater racial self-identification with a resultant increase in self-assurance and personality stability.

Developments in the science of social dynamics in the past ten years were related to the effect that the process of learning is, to a major extent, a function of the learning environment which is at its optimum when there is mutual self-identification between the students in the learning group and between them and a teacher who can only in this way establish the substitute parental relation which is essential to the degree of classroom discipline required for effective instruction.

Finally, intervenors proved that these differences in aptitude and class response are of ethnic rather than environmental origin, the product of separate evolutionary development related to existing physical variations between the two races; that these differences were not subject to elimination by any change of schooling or economic background; and that any compulsory congregation of two such groups under a uniform curriculum as requested by respondents would substantially destroy the existing levels of instruction in the Charleston schools and would cause severe and permanent educational and psychological injury to both negro and white school children.

The District Court refused to consider or make findings on this evidence, holding, in the only portion of the ruling here appealed from:

> "The defendants by their answer and the intervenors by similar allegations contend: 'that there are differences and disparities between the ethnic group allegedly represented by plaintiffs (Negro children) and that represented by petitioners (white children) as to form a rational basis for separating such ethnic groups in the schools of Charleston.'

"In Brown v. Board of Education, 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L. Ed. 873, the United States Supreme Court held:

> 'We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.'

> "The position taken by the defendants and the intervenors in effect, asks this Court (a U.S. District Court) to overrule the United States Supreme Court, the Fourth Circuit Court of Appeals and all the numerous decisions by those courts, reiterating, expanding and amplifying the holdings of the United States Supreme Court in Brown v. Board of Education (supra). Under the doctrine of *stare decisis* this Court has no such authority." (App. pp. 12-3).

The Court of Appeals made no reference to the point and adopted the District Court's opinion as its own (App. p. 20).

Accordingly, the sole question on this petition is whether the ruling of this Court in *Brown* v. *Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954), establishes as a rule of constitutional law the fact that there do not and cannot exist educationally significant ethnic differences in learning aptitudes and correlative educational requirements between children of different races.

Reasons Relied on for Allowance of Writ

This petition brings before this Court for the first time an aspect of the school desegregation cases never previously tried or appealed. In all legal history prior to 1954, the constitutionality of separate schools for white and negro children was based upon decisions—including those of this Court—which assumed as a matter of judicial notice that a difference in educability existed between white and negro children. Although a great volume of published test results existed at that time which confirmed those assumptions, we find no case prior to 1954 which ever subjected the underlying factual inquiry to the test of the witness stand or which had made any effort to determine the scientific validity of the assumed differences, or whether the differences were individual rather than ethnic in character.

In the records of the cases which underlay this Court's decision in *Brown* no defendant appears to have made any substantial effort—possibly on the assumption that prior decisions did not require it—to contradict the assertions made therein by the witnesses for those petitioners that no such differences were shown in the existing literature and that separate schooling was psychologically injurious to the negro student. If indeed that evidence be correct, and in 1954 this Court had before it no other record, then the conclusion of this Court that separate schools for children of "similar age and qualifications" were inherently unequal and injurious to the members of the minority group is logically and legally unimpeachable.

If, to the contrary, there do exist significantly different educational patterns in the two groups, then every court order which compels pedagogical uniformity by requiring the compulsory intermixture of these students, deprives the members of one group of the type of school best fitted

to realize its educational potential or ends in a compromise to the injury of both.

Whatever the social origin and past history of the separate school systems of the South may have been, it is conceded today, even by respondents' experts, that the separate negro schools in Southern cities are not only producing a higher scholastic achievement level for Negroes, but are more effective in developing in them greater educational motivation and personal assurance. If the constitutionally acceptable purpose of schools is the education of children rather than a judicially enforceable demonstration of the political rights of their parents, an early determination of the truth or falsity of these propositions under the protective scrutiny of the rules of evidence and cross-examination is essential.

Other than this case, proof of ethnic differences in educability has been offered in only four cases. Two were tried and are now *sub judice* before district courts. The other two have been argued and are awaiting decision in the Fifth Circuit on appeals from decisions favoring the position of these petitioners. This is the first case ever to reach this Court on this question, an issue whose truth or falsity may determine for a generation or more the educational levels of our public schools and the American standard of literacy.

Summary of Argument

1. Questions of fact are matters as to which reasonable men can differ. The development of new scientific data requires a reconsideration of conclusions drawn from earlier evidence.

2. Evolutionary constitutional interpretation is often based on social and other scientific proof and when so

based is always open to a demonstration of later knowledge or prior omission of pertinent principle.

3. A true difference in learning pattern is a meaningful basis for reasonable classification in education, and where the differences shown are of ethnic origin, race or color is not in itself the basis of selection but is merely a "convenient index" to identify group members.

4. In *Brown* v. *Board of Education of Topeka*, this Court did not purport to foreclose all future inquiry as to the existence of such differences.

ARGUMENT

I

Whether Substantial Physiological or Mental Differences Exist Is a Question of Fact

The importance of factual inquiry in determining questions of constitutionality is illustrated by *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938). In an opinion upholding the validity of a Federal act which prohibited the shipment of filled milk in interstate commerce, this Court said (*id.*, 153):

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . , and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."

In *Grovey* v. *Townsend*, 295 U.S. 45 (1935), this Court ruled that the right to vote in a Texas primary was not a right guaranteed by the Constitution; then, nine years later in *Smith* v. *Allwright*, 321 U.S. 649 (1944), on a factual demonstration of the meaning of a primary election in a Southern state such as Louisiana, the Court reversed itself, saying of its earlier decision that it had "looked upon the denial of a vote in a primary as a *mere refusal* by a party of party membership" (*id.*, 660-1).

This principle requires that new, scientific data should always be admissible to evaluate earlier conclusions about the nature of society. In *Sweezy* v. *State of New Hampshire*, 354 U.S. 234 (1957), this Court departed from an earlier ruling to reverse a "subversive activities" conviction. As explained in the concurring opinion (*id.*, 261-2):

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true of the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible."

Among such areas of inquiry are the faculties, abilities and aptitudes of people. To illustrate this, let us take the three great constitutional equivalents in terms of non-discrimination: race, religion and sex. There appear to be no cases other than *Brown* itself in which the determination in this Court has turned upon the existence or non-existence of the physiological or psychological differences *between races* and the question would appear to be totally irrelevant in the context of religion. However, when we come to the third of these distinctions we find a number of decisions which are not only in point, but which develop the essentially factual nature of the inquiry required.

The Court of Appeals of the State of New York in *People v. Williams*, 189 N.Y. 131, 81 N.E. 778 (1907), invalidated as unconstitutional a state statute which prohibited night work for women in factories during specified hours. The court held that on the record before it there was nothing to show that an adult woman should not be "entitled to be placed upon an equality of rights with the man" *(id.*, 137).

This did not solve the underlying problem, which was in fact based upon the physiological differences between the sexes and the resultant necessity for difference of treatment in according them equal employment opportunity. Thus, eight years later, another attack was made upon a similar successor statute. In the second case the defense proved for the first time by scientific evidence that there was a difference between men and women such as to justify the application of different standards. In the later case, *People v. Charles Schweinler Press*, 214 N.Y. 395, 108 N.E. 639 (1915), *appeal dism.*, 242 U.S. 618 (1916), the Court of Appeals held that its former decision in *Williams* was necessarily limited to the facts of that record.

and that the failure to show the relevant differences between the two groups was the cause of the earlier decision.[1]

Distinguishing the *Williams* case, the court said (*id.*, 410-11):

> "But the facts on which the former statute might rest as a health regulation and the arguments made to us in behalf of its constitutionality were far different than those in the present case. . . . While theoretically we may have been able to take judicial notice of some of the facts, . . . actually very few of these facts were called to our attention."

The *Schweidler* case was commented upon in a Note, 28 Harv. L. Rev. 790 (1915), written by Mr. Justice Frankfurter, in which he stated (791):

> "First: Questions to the constitutionality of modern social legislation are substantially questions of fact. The formulae of the Bill of Rights do not furnish yardsticks by which the validity of specific statutes can be measured. Concepts like 'liberty' and 'due process' are too vague in themselves to solve issues. They derive meaning only if referred to adequate human facts. The legal principles cannot be employed *in vacuo*. . . . Deference to this data [on the relevant male-female differences by the Factory Investigating Committee] was the very foundation of the court's decision on the legal question.
>
> "Secondly, and closely following as a corollary, in

[1] In upholding the statute, the Court of Appeals specifically considered the problem offered by the exceptional case. It was "not a basis for a constitutional objection" to a statute like this "that in exceptional cases it may prevent employment of some women for a short time between those hours under such conditions as would be productive of no substantial harm" (214 N.Y. 395, 407).

asmuch as facts are dynamic, constitutional decisions upon which they must be based cannot be static. Conditions change, legislation deals with these changed conditions, and so must the courts. A book like Miss Goldmark's 'Fatigue and Efficiency' completely undermines prevalent assumptions as to facts and, thereby, may well destroy the very groundwork of prior judicial decisions. Therefore, the doctrine of *stare decisis* has no legitimate application to constitutional decisions where the court is presented with a new body of knowledge, largely non-existing at the time of its prior decision. This was precisely the situation in the *Schweinler* case. The seven years that elapsed between it and the *Williams* case developed an overwhelming mass of authoritative data, and it is by the light of such new knowledge that the justification of legislative action must be determined."

Mr. Justice Frankfurter referred to his earlier article with approval in *International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957), affirming an injunction against peaceful picketing, contrary to this Court's prior decision in *Thornhill v. Alabama*, 310 U.S. 88 (1940), saying (354 U.S. 284, 289):

> "Soon, however, the Court came to realize that the broad pronouncements, but not the specific holding, of *Thornhill* had to yield 'to the impact of facts unforeseen,' or at least not sufficiently appreciated."

Just as the *Schweinler* case, *supra*, overruled the presumption that women were all "equal" to men, on which the earlier *Williams* decision had been based, so in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), this Court upheld the constitutionality of a Washington State law fixing minimum wages for women and minors and overruled

its prior ruling in *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), which had held the D. C. Minimum Wage Act invalid under the equivalent portion of the Fifth Amendment.

In its "re-examination of the *Adkins* Case," the Court took note of (p. 390) "the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered" and emphasized that reasonable classification was to be governed by "woman's physical structure" quoting (p. 394) *Müller* v. *Oregon*, 208 U.S. 412 (1908), as showing the constitutional authority of a state to limit working hours of women on the basis of differences between the sexes.

Nor is difference of physical structure alone the basis for such classifications. Mental differences are equally valid. In *Jacobson* v. *Lenhart*, ——, Ill. ——, 195 N.E. 2d 638 (1964), it was recently held that a difference in mental maturity considerably less than that shown in this record was a sufficient ground for a state to constitutionally discriminate between men and women in setting differing periods of limitation of actions.

Mr. Justice Sutherland, in *United States* v. *Provident Trust Company*, 291 U.S. 272 (1934), held that such scientific evidence of human differences must be permitted to overturn even a conclusive legal presumption, in that case the question of the possibility of further issue to a life tenant. This reference to scientifically shown human differences has also been used to permit blood tests to overcome one of the strongest of legal presumptions—paternity of the husband. *Beach* v. *Beach*, 114 F. 2d 479 (D.C. Cir. 1940).

If factual inquiry is the key to constitutional application, then certainly scientific evidence of ethnic differences is an appropriate judicial issue. The Ninth Circuit, in *Farrington* v. *Tokushige, et al.*, 11 F. 2d 710 (1927),

judicially observed that obvious ethnic differences existed between Japanese and Caucasian citizens in Hawaii. Such differences are the only constitutional justification for the numerous statutes still in effect which distinguish between American Indians and members of other races. Mr. Justice Douglas in his writings has similarly commented upon the possibility of regulations based on the special traits of Indians and Eskimos. Obviously not every difference in trait between races has educational significance, but just as clearly some may have. Differences which control the rate and type of learning, the nature of the teaching process and the selection of subject are evidently of educational meaning and are facts capable of proof or disproof.

That such matters may be of a complex scientific nature and lie within the field of the social sciences do not change their nature as facts and therefore do not eliminate the necessity for proof as a basis for judicial action.

> "Social and behavioral scientists and lawyers have long recognized that the law is concerned with, and is also in turn very deeply affecting, concepts of behavior and of society which these sciences are in the process of investigating. Consequently there have been from time to time attempts not only to incorporate the attitudes of science in certain areas but, what is more, to adopt the findings of scientists. . . . In fact, since law in the end always deals with human beings, there would seem to be almost no area in which the influence and the findings of the social and behavioral sciences might not be used to explain and improve the law in its daily operation upon the members of our society.
>
> "Some progress has been made in the acceptance of this point of view by lawyers. For example, we are used to seeing the trained social service worker or probation officer in and around the courts. In anti-trust actions, not only the government but also the

corporations under attack employ the factual findings and the arguments of economics as a major part of their cases. When the United States Supreme Court reversed a long-standing position on segregation of the races, it relied in part upon evidence drawn from areas such as education and sociology. [Brown v. Board of Educ., 349 U.S. 294 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954)]. Many other examples could be cited to show that in fact there has been considerable acceptance of the techniques and conclusions of all the areas of inquiry we group under the heading of Social and Behavioral Science." (Fahr, S. M. and Ojemann, R.H., *The Use of Social Behavior Science Knowledge in Law*, 48 Iowa L. Rev. 59 (1962).

Similarly, although a recent report of a special committee of the American Association for the Advancement of Science stated the opinion of the scientists involved that the relative educability of white and negro students was legally irrelevant to the issue of school segregation (*Science and the Race Problem* in Science, November 1 1963, p. 558), nevertheless it recognized the essentially factual nature and present lack of knowledge of educationally related ethnic differences (*id.*, 558):

> "These allegations confront the scientific community with an unavoidable challenge, for in our view all scientists bear a responsibility toward the proper social application of scientific knowledge and have the duty to resist the corrosive effects of social and political pressures on the integrity of science. It is essential, therefore, that we determine whether these claims are valid, and, whether valid or not, what their significance is to the scientific community and to the public."

Petitioners respectfully submit that it is at least equally important to determine what the significance of these facts is to the law since present resolution of the question is needed if further constitutionally directed social evolution is to be based upon pragmatic reality rather than upon emotional presupposition.

As such questions of fact, the District Court and the Court of Appeals were clearly in error to rely on the doctrine of *stare decisis*, which is solely concerned with principles of law.

> "The doctrine of stare decisis . . . relates only to questions of law." Freeman, A. C., *A Treatise on the Law of Judgments*, Vol. 2, p. 1329 (5th ed., 1925).

II

A State May Reasonably Classify Groups of Citizens Upon the Basis of Substantial and Relevant Differences Between Them.

The broad principles of reasonable classification have been laid down by this Court over the years and are a substantial and fundamental part of our constitutional law. As said in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 147, (1940):

> "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

In *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), the court detailed the basis for such classifications under the Equal Protection clause, quoted with approval in *Morey* v. *Doud*, 354 U.S. 457, 463-4 (1957):

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power

to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369."

In *McGowan v. Maryland*, 366 U.S. 420, (1961), this Court said (425-6):

"The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived

to justify it. See Kotch v. Board of River Port Pilot Com'rs., 330 U.S. 552, 67 S. Ct. 910 L. Ed. 1093; Metropolitan Casualty Ins. Co. of New York v. Brownell, 294 U.S. 580, 55 S. Ct. 538, 79 L. Ed. 1070; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369; Atchison, T. & S. F. R. Co. v. Matthews, 174 U.S. 96, 19 S. Ct. 609, 43 L. Ed. 909."

It is hornbook law that education is primarily a problem for the individual states. Barring unconstitutional discrimination, the state has the obligation and the correlative authority to determine the location of school districts, the level of study, the scholastic norm, the textual content, the various pedagogical theories which will govern the educational progress, whether education will be compulsory or voluntary, and for what period, and the amount of money which will be budgeted for it. Such responsibility extends even into the peripheral area of personal associations affecting study: *Pugatte* v. *Board of Regents*, 102 F. Supp. 407 (W. D. Okla. 1951), *affirmed without opinion*, 342 U.S. 936 (1952) (supervision of student housing arrangements); *Waugh* v. *Board of Trustees*, 237 U.S. 589 (1915) (prohibition of Greek letter fraternities); *Webb* v. *State University*, 125 F. Supp. 940 (N. D. New York 1954), *appeal dismissed*, 348 U.S. 867 (1954) (outlawing fraternities and sororities).

In exercising this authority, what limit is set on the States in terms of racial characteristics? The problem of using race and color as a basis of classification is illustrated by *Hernandez* v. *Texas*, 347 U.S. 475 (1954), which refers to the necessity of ascertaining facts as a prerequisite for the determination of the question of reasonableness of classification. Mr. Chief Justice Warren, after

pointing out that race and color may serve as a convenient index for differentiating between groups, said (*id.*, 478):

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out that class for different treatment *not based on some reasonable classification*, the guarantees of the Constitution have been violated." (Emphasis added)

Similarly, the Court of Appeals for the Fifth Circuit, noting the absence of any relevant criteria for racial separation in *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957), specifically called attention to the lack of evidence of "any reasonable classification of students according to their proficiency or health. . . ."

To the same general effect is the statement of this Court in *Bolling* v. *Sharpe*, decided the same day as *Brown*, where the Court said, with respect to a classification of children into separate schools by race in the District of Columbia (347 U.S. 497, 499 [1954]):

> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."

Clearly a classification which can be "scrutinized with particular care" is not a classification which is invalid *per se*. Petitioners have no objection to such scrutiny—on the contrary, it was the refusal below to scrutinize the proposed classification which has led to this application.

III

This Court's Decision in Brown vs. Board of Education Supports the Present Application

In *Brown* this Court defined the underlying inquiry thus (347 U.S. 483, 493):

> "We come then to the question presented: Does segregation of children in public schools *solely* on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" (Emphasis added)

Although it would appear sufficiently clear on its face that this calls for a review of the facts rather than of law, we are confirmed when we find the Court looked to the testimonial and other evidence in the records before it and to a "Brandeis" submission of scientific opinion submitted by agreement and limited the decision to the separation of children "of similar age and qualification" (494).

From the Kansas record, this Court read (*id.*, 494):

> ". . . . the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

These statements involve on their face most complex questions of sociology and psychology, the "interpenetrating aspects of holistic perplexities" of *Sweezy*. Whether negro children in Kansas felt that separate schooling de-

noted inferiority, whether such a sense of inferiority existed and affected their motivation to learn, and thus whether their motivation to learn was increased or diminished by segregation, were questions which could only be referred to scientific studies for resolution. And when this Court further said that the above-quoted finding of injury through segregation "is amply supported by modern authority" (347 U.S. 483, 494, n. 11), the Court clearly rested its ruling on record expressions of non-judicial expert opinion.

It seems patently absurd to assume that this Court in *Brown* was trying to set limits for all time to the extent of modern psychological knowledge. Yet it could only be by such an assumption that the District Court and Court of Appeals could have denied as a matter of law any further inquiry into the current state of that knowledge.

This conclusion is sustained in finding that every district court which has considered the nature of this Court's decision in *Brown* has stated it to be based on facts contained in the four underlying case records. *Stell* v. *Savannah-Chatham Cty. Bd. of Ed.*, 220 F. Supp. 667 (S.D. Ga. 1963); *Taylor* v. *Board of Education of New Rochelle*, 191 F. Supp. 181 (S.D.N.Y. 1961), *cert. den.*, 368 U.S. 940 (1961); *Calhoun* v. *Board of Education of Atlanta*, 188 F. Supp. 401, 409 (N.D. Ga. 1959); *Frasier* v. *Board of Trustees of N. C. Univ.*, 134 F. Supp. 589, 592 (M.D.N.C. 1955), *affirmed per curiam*, 350 U.S. 979 (1956).

Conclusion

Petitioners submit that if it can be shown that a true distinction exists between these two groups of children, such that separate teaching in the Charleston schools would substantially improve the education of both, then such evidence would not only be admissible but would be an essential prerequisite to the issuance of a proper decree in

equity intended to afford "equal educational opportunities" to the classes represented both by petitioners and respondents.

Petitioners pray this Court to reverse and remand the case to the District Court with instructions to consider petitioners' evidence tending to show that the relief demanded by respondents would be educationally and psychologically harmful to the children involved.

Respectfully submitted.

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